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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

)
Interconnection Between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 95-185

MGC COMMUNICATIONS, Inc.
PETITION FOR CLARIFICATION ON RECONSIDERATION AND REQUEST FOR
EXPEDITED TREATMENT

MGC Communications, Inc., d/b/a/ Mpower Communications, Corp. ("Mpower"), by its undersigned counsel and pursuant to Section 1.106 of the Federal Communications Commission's ("Commission") regulations, 47 C.F.R. § 1.106, respectfully seeks reconsideration of the Third Report and Order in the above-captioned proceeding.¹ Mpower is a competitive local exchange carrier ("CLEC") that provides facilities-based local, long distance and DSL services. In order to provide these services, Mpower leases unbundled network elements ("UNEs") from incumbent local exchange carriers ("ILECs"). Mpower therefore has a significant interest in making certain that UNEs are made available by ILECs in a timely and nondiscriminatory manner to competitors.

Since the Commission adopted the *UNE Remand Order*, Mpower has discovered that some ILECs (i) are not yet prepared to negotiate terms and conditions for dark fiber, and (ii) want to withhold from CLECs a significant portion of their dark fiber until some time in the future, often as

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, DA 99-238 (rel. November 5, 1999) ("*UNE Remand Order*") (published in the Federal Register on January 18, 2000, 65 Fed. Reg. 2542).

much as two years distant. As discussed below, Mpower urges the Commission to clarify on reconsideration that ILECs must begin good faith negotiations relating to dark fiber under Section 252 immediately, prior to the effective date of the new rules, and to require ILECs to make dark fiber available on a first-come, first-served basis. Mpower requests that the Commission make these determinations on an expedited basis and that it make these clarifications effective upon adoption, in order to afford the best opportunity for dark fiber to be available by May 17, 2000.

I. The Commission Should Require ILECs to Propose and Negotiate the Terms for Provisioning Dark Fiber Immediately

In the *UNE Remand Order*, the Commission reevaluated the network elements that the ILECs must make available on an unbundled basis, and required that some new elements be made available, including dark fiber.² These new rules do not go into effect until May 17, 2000.³ Mpower recognizes that the ILECs are under no obligation to make UNEs available prior to this effective date. However, Mpower urges the Commission to clarify on reconsideration that, while its rules do not become effective until May 17, the ILECs are under a statutory obligation to negotiate in good faith prior to the effective date.⁴ This duty to negotiate includes providing CLECs with their proposed terms, conditions, and pricing for new UNEs that will be unbundled pursuant to the *UNE Remand Order*.⁵

Any delay in discussing terms and conditions for the provisioning of dark fiber amounts to an unnecessary delaying tactic and is contrary to the spirit and intent of the *UNE Remand Order* and Section 251 of the Communications Act.⁶ Only by being offered the terms and conditions for providing dark fiber as a UNE in a prompt manner will CLECs such as Mpower be in a position to order or actually begin negotiating for the provision of this new UNE under Section 252. If CLECs

² See *UNE Remand Order* at ¶¶ 196, 209.

³ 47 C.F.R. § 51.319(g).

⁴ See 47 U.S.C. § 251(c)(1).

⁵ The new rules become effective May 17, 2000. 47 C.F.R. § 51.319(a)(1).

⁶ 47 U.S.C. §251.

are not entitled to request dark fiber until the rules become effective, then CLECs that seek agreements pursuant to Section 252 will be forced to wait until May 17, 2000, before they can even begin to negotiate terms. If this interpretation prevails, then UNEs will not be available on May 17, but instead that will be the date on which negotiations for the UNEs begins. Thus, assuming the best case scenario in which the parties are in complete agreement on the terms and conditions on the first day of negotiations and submit the executed agreement for approval by a state commission, it could be as long as ninety days until the agreement is approved.⁷ If, as is more likely, the agreement must be negotiated or arbitrated, obtaining the agreement could take up to nine months from the effective date of the rules.⁸ This delay is unnecessary and unreasonable. The effect would be to slow competition.

The parties should be able to negotiate the terms for access to UNEs prior to the effective date of the new rules. Section 251 creates a duty to negotiate the terms and conditions of agreements for access to UNEs.⁹ The Commission has recognized that actions that are intended to delay negotiations are inconsistent with this statutory duty.¹⁰ The Commission has also recognized that unnecessary delay harms consumers, competitors and competition generally.¹¹ Because the duty to negotiate is statutory, it exists independent of the new UNE rules. Thus, even while the rule that requires ILECs to provide dark fiber does not become effective until May 17, the Commission should recognize that the good faith negotiation requirement extends to the terms upon which these new UNEs must be made available. This will avoid unnecessary delay by permitting CLECs to plan

⁷ See 47 C.F.R. § 252(e)(4).

⁸ See 47 U.S.C. §§ 252(b)(1), (e)(4).

⁹ *Id.*

¹⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 154 (rel. August 8, 1996) ("*Local Competition Order*").

¹¹ See, e.g., *Id.*; see also *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket No. 96-262, 11 FCC Rcd 21,345, ¶ 11 (rel. December 24, 1996)

their network configurations and needs now, so that they will be in a position to order dark fiber when it is required to be made available, rather than having to wait for the completion of negotiations and state commission review before even being permitted to order it.

Mpower therefore urges the Commission to clarify on reconsideration of the *UNE Remand Order*, that the nine month interconnection negotiation period for new UNEs begins upon a formal request to negotiate, or amend, an interconnection agreement that includes dark fiber. The Commission should also require ILECs to propose, by April 17, 2000, the specific terms and conditions for providing dark fiber as a UNE.

II. The Commission Should Clarify that Dark Fiber Must be Made Available on a First-Come, First-Served Basis

Mpower also urges the Commission to determine on reconsideration that ILECs must make existing dark fiber facilities available on a first-come, first-served basis. The position of some ILECs that dark fiber is unavailable because capacity is being held in reserve for the ILEC's future use is contrary to the nondiscrimination requirement of Section 251(c)(3) of the Act.¹² In the *UNE Remand Order*, the Commission found that this requires that ILECs provide UNEs "in substantially the same time and manner" as they provide them to themselves.¹³ By reserving dark fiber for its own future use, however, ILECs are violating the nondiscrimination requirement and hindering competitive entry by warehousing facilities.¹⁴ The harm to competitors, competition and consumers by these discriminatory practices has long been recognized by the Commission.¹⁵ Accordingly, the Commission needs to act to curb this practice in a simple and unambiguous manner.

¹² 47 U.S.C. § 251(c)(3).

¹³ *UNE Remand Order* at ¶ 490 (quoting the *Local Competition Order*, 11 FCC Rcd at 15763-64).

¹⁴ *See MCI v. BellSouth*, 40 F. Supp. 2d 416, 425 (E.D.Ky 1999).

¹⁵ *See, e.g., Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd. 14,712, ¶ 186 (rel. October 8, 1999).

Mpower urges the Commission to determine that where dark fiber exists, in accordance with Section 251(c)(2) ILECs must provide dark fiber to themselves and all requesting CLECs, including CLECs affiliates of ILECs, in an equal manner. The easiest and fairest way to implement this principle is for the Commission simply to require that ILECs and their CLEC affiliates provide dark fiber to all requesting carriers, including themselves and their CLEC affiliates, on a first-come, first served basis. Adoption of such a rule would help give all competitive carriers a reasonable opportunity to obtain dark fiber as a UNE. It will also promote the goals of the Act by promoting competition and its attendant benefits: economic efficiency and the provision of new and less expensive services to consumers.¹⁶ The first-come, first-served rule will achieve the pro-competitive goals of the Act by making dark fiber available to those entities that are in a position to utilize it.

Mpower recognizes that there may be some limited circumstances in which the Commission might deem it appropriate for ILECs to reserve UNEs, including dark fiber. These include where ILECs are building network elements to meet existing, documented, customer commitments. Such reservation of dark fiber should not be valid for longer than six months. Six months is a reasonable amount of time within which an ILEC should be expected to be able to plan for, and provision services employing dark fiber. Utilization of dark fiber only requires that electronic components be connected and calibrated at the ends of the dark fiber. The most time-consuming construction, laying the cable itself, has already been completed. Six months is more than enough time to plan and light up fiber optic cable. Some ILECs have argued that they should be permitted to reserve dark fiber for up to two years. This is an unreasonable amount of time, given the limited amount of construction required. Six months is more than enough time to install a new fiber optic cable in order to meet an ILECs own anticipated needs. In the interim, CLECs that are poised to offer services over dark fiber should be given access to it as a UNE so that these resources can be utilized to provide services to the public. The dark fiber should not be permitted to remain dark because an ILEC is either so inefficient that it cannot install it within six months, or is warehousing fiber capacity in vague anticipation of future needs. Thus, Mpower urges the Commission to require ILECs

¹⁶ See *Local Competition Order* at ¶ 315 (providing “just and reasonable” terms for UNEs should serve to promote fair and efficient competition).

to make dark fiber available to all carriers on a first-come, first-served basis. In the alternative, the Commission should clarify that in situations where it is necessary for an ILEC to reserve dark fiber, it may not do so more than six months in advance and any such reservation must be based on preexisting customer commitments, supported by preexisting documentation.

Additionally, The Commission should establish safeguards to assure that any CLEC affiliate of an ILEC is not able to warehouse the ILEC's dark fiber by requesting all, or a disproportionate portion of it. The Commission should provide that a CLEC affiliate of an ILEC may obtain no more than a specified, limited percentage of the ILEC's dark fiber. Mpower suggests that 25 percent would be an appropriate limit for this purpose. This will balance the rights of the CLEC affiliate to obtain dark fiber with those of independent CLECs by assuring that all can obtain dark fiber as a UNE. If the ILEC finds that the 25 percent cap is too restrictive based upon current deployment, it can then deploy more dark fiber.

Mpower also takes this opportunity to express its concern about the possibility that an ILEC could attempt to immunize itself from application of Section 251 unbundling obligations by transferring dark fiber, and shifting future deployment of dark fiber, to a CLEC affiliate. The Commission should state on reconsideration that as long as a lack of access to dark fiber as a UNE would impair a CLEC's ability to provide competitive services, that any dark fiber transferred by an ILEC to its CLEC affiliates, or deployment of dark fiber by the CLEC affiliates of an ILEC, will be subject fully to the unbundling obligations of Section 251.

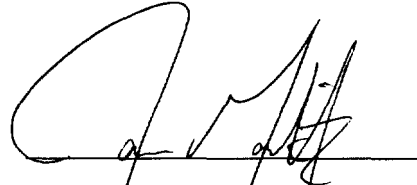
III. Request For Expedited Treatment

As noted, the requirement that ILECs make dark fiber available as a UNE becomes effective on May 17, 2000. In order to provide the greatest likelihood that dark fiber and other UNEs will be made available on that date or as soon as possible thereafter, Mpower requests that the Commission act on this Petition by April 17, and that it make its determination effective upon adoption. Later action will substantially undercut the ability of CLECs to obtain dark fiber and other UNEs by the May 17, 2000, effective date of the rules.

IV. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these comments.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be "Eric J. Branfman", written over a horizontal line.

Eric J. Branfman
James N. Moskowitz
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Counsel for Mpower Communications, Inc.

Kent F. Heyman
Senior Vice President and General Counsel
Francis D. R. Coleman
Vice President – Regulatory affairs
171 Sully's Trail
Suite 202
Pittsford, NY 14534

Mpower Communications Corporation

Dated: February 17, 2000

CERTIFICATE OF SERVICE

I, Ivonne J. Diaz, hereby certify that I have on this 17th day of February 2000, served copies of the foregoing Emergency Petition for Reconsideration of Mpower Communications, Inc. on the following via hand delivery.

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals - TW-A325
445 12th Street, S.W.
Washington, DC 20554

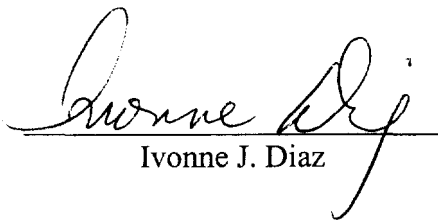
Lawrence E. Strickling
Federal Communications Commission
1919 M Street - Room 500
Washington, DC

Robert Atkinson
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, DC 20554

Margaret Egler
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, DC 20554

Michelle Carey
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, DC 20554

International Transcription Service
1231 20th Street, N.W.
Washington, DC


Ivonne J. Diaz